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How to cite:

Claydon, Lisa and Catley, Paul (2016). Abolishing the Insanity Verdict in England and Wales: A Better Balance between Legal Rules and Scientific Understanding? In: Moratti, Sofia and Patterson, Dennis eds. Legal Insanity and the Brain: Science, Law and European Courts. Oxford: Hart Publishing, pp. 207–237.

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Version: Accepted Manuscript

Link(s) to article on publisher's website:

<http://www.bloomsburyprofessional.com/uk/legal-insanity-and-the-brain-9781849467919/>

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Abolishing the Insanity Verdict: a better balance between legal rules and scientific understanding?

Introduction

One of the most problematic relationships between neuroscience and the law is the politicised area of claims of insanity. The relationship between medical science and the law has defined and shaped the insanity defence. The issue that reformers have had to grapple with since the inception of the modern defence of insanity is the public perception of the insanity plea. In 2012-13 the Law Commission for England and Wales, much to its credit, undertook a thorough review of the defences of insanity and automatism. This culminated in the publication of a Discussion Paper entitled *Criminal Liability: Insanity and Automatism*.¹ Preceding this document, a Scoping Paper² and supporting supplementary materials³ had been published. The law's effect is described in the Supplementary Materials as attributing a label that is 'inaccurate, unfair and stigmatising'.⁴ Perhaps another flaw identified is the most concerning:

the defence does not fairly identify those who ought not to be held criminally responsible as a result of their mental condition, and so some of those vulnerable people remain in the penal system, to their detriment, and to the detriment of society at large.⁵

In its discussion of how the criminal law with regard to the general defence of insanity should be reformed, the Law Commission identify several issues which contribute to the underuse of the defence of insanity. One is the problematic distinction which was confirmed in *R v Quick*⁶ between sane and insane automatism. This distinction is based upon the identified legal cause of the automatism claim. If the cause is identified as being external to the accused the appropriate plea is sane automatism whereas, if the legal cause is deemed to be internal, the plea is insane automatism. This distinction has both theoretical and practical flaws.⁷ The distinction also creates real problems with the sentencing of those who are deemed insane automatons and yet may not suffer from a medically accepted mental disorder.⁸ Another issue, a contributory factor in the underuse of the defence, is said to be the nature of the M'Naghten Rules themselves and how they are applied.

In reviewing the law and how it should be reformed the Law Commission only briefly touched upon the possible implications of growing scientific understanding of the brain for the reformed defence. The first part of this chapter will explore how the M'Naghten Rules have reached a point where they are viewed as complex and far removed from a modern medical perspective of mental disorder. It

¹ The Law Commission for England and Wales, *Criminal Liability: Insanity and Automatism – A Discussion Paper*, published 23 July 2013.

² The Law Commission for England and Wales, *Insanity and Automatism – A Scoping Paper*, published 18 July 2012.

³ The Law Commission for England and Wales, *Insanity and Automatism – Supplementary Material to the Scoping Paper*, published 18 July 2012.

⁴ Ibid para 1.32.

⁵ Ibid para 1.33.

⁶ (1973) QB 910 (CA)

⁷ For a discussion of these see for example the section in the Discussion Paper headed 'Arbitrary classifications' in n1 paras 5.39-5.54.

⁸ This leads to problems with the disposal/detention of such individuals who receive a not guilty by reason of insanity verdict. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms specifically through its interpretation by case law provides that those who are not of unsound mind should not be detained for 'treatment'. For a discussion of this see the Supplementary Materials n3 paras 5.5 to 5.41.

will also trace the difficult politico-legal environment in which the defence developed. The proposals put forward in the Law Commission's Discussion Paper will be reviewed. Finally, the chapter will consider whether the Law Commission has achieved in its conclusions and proposals the objective that it set out in the Supplementary Material to the Scoping Paper:

We believe it is important as a matter of principle that criminal responsibility should be correctly ascribed. Doing so, through operation of the law, reflects society's judgment and attribution of blame. It is not just a matter of accurately communicating by means of a verdict what conclusion a court has reached about a person's culpability (what is described as "fair labelling"), though that is important too.⁹

Historical development of the common law of insanity – the trial of Daniel M’Naghten

The criticism that the defence 'does not fairly identify those who ought not to be held criminally responsible' leads to a question: how did this come about? The answer lies in the common law and its interpretation of the M’Naghten Rules. The rules were not set down in a legal case following legal argument. They are an explanation given in answer to questions put by the House of Lords, as the result of public and political disquiet at the acquittal¹⁰ of Daniel M’Naghten, following what was possibly an attempt to assassinate the Prime Minister, Robert Peel. M’Naghten had shot and killed Edward Drummond, Peel's political secretary. Furthermore, the rules are set out in answer to questions regarding the instructions to be given to juries in particular circumstances - cases of partial insanity where there is evidence of a delusion that the criminal act will redress or revenge 'some supposed grievance or injury' or produce a public benefit.¹¹

The political disapproval of the decision to acquit M’Naghten is palpable. It is clear from the report of what has become referred to as M’Naghten's case. It is also clear from the discussion in the House of Lords following M’Naghten's acquittal as the result of his successful insanity plea. Hansard reports the Lord Chancellor as making the following statement at the opening of a House of Lords' debate upon the matter:

A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secured; he was committed for trial; that trial has taken place, and he has escaped with impunity. Your Lordships will not be surprised that these circumstances should have created a deep feeling in the public mind, and that many persons should, upon the first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws, in order that a repetition of such outrages may be prevented.¹²

The influence of public opinion on the discussion in the House of Lords is notable. The Lord Chancellor describes the subject matter of the debate as 'one in which the public take a deep interest. Everything, therefore, connected with it ought to be laid before the public, through your Lordships, with the upmost possible precision.'¹³

⁹ N3 para 1.13

¹⁰ Daniel M’Naghten was found 'Not Guilty, on the ground of insanity' All ER Rep [1843-60] 229, 230.

¹¹ Ibid

¹² House of Lords' Hansard 13 March 1843, 713 column 2

¹³ Ibid 715 column 2

The outcome of this debate was that judges from the Queen's Bench were summoned to appear before the House of Lords to explain the law on insanity. Both the dissenting and the majority legal opinions show the animosity of the judges to the exercise by the legislature of this power.¹⁴

What was the purpose of the interrogation of the judges?

In answering this question it is necessary to look at some of the questions posed by the House of Lords and examine the answers given. The first question posed by the politicians was very focussed with regard to the responsibility of those who suffered from a certain type of delusion and as a result of that delusion committed a criminal act. The question specifically focussed on determining the criminal responsibility of someone who:

at the time of the commission of the alleged crime ... knew that he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?¹⁵

This issue was also the central focus of the fourth and fifth questions posed by the House of Lords to the judges. The fourth question concerned the precise nature of what should excuse criminal responsibility and the fifth on the use of expert evidence to inform jury decisions. Their Lordships asked the judges: 'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?'¹⁶

This question of what should excuse is central to the debate surrounding the defences of automatism and insanity to this day. Similarly issues surrounding expert evidence remain important. The final question put to the judges betrays scepticism of a certain type of expert evidence:

Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?¹⁷

The answers of the judges are not unanimous. Maule J. dissents from the majority view given by Lord Chief Justice Tindal. Maule's reasons for dissenting are interesting. He expresses concerns at giving insanity, a fixed, rule bound, definition. Maule is concerned at the specificity of the questions posed by the legislature. His particular concern is that he has not had the benefit of hearing adversarial legal argument on the issues raised by the questions. He is also concerned that, given the importance of the questions and the fact that the issue is 'of frequent use'; the answers given will 'embarrass the administration of justice when they are cited in criminal trials.'¹⁸ His concern here seems to be that the facts of such cases vary infinitely and therefore an inflexible statement of the law rather than a general principle will prove to be problematic. Underlying the reasoning in his opinion seems to be an implicit view that the House of Lords should never have entered into this dialogue with the judges as this is an unwarranted interference with the normal processes of the common law.

¹⁴ N10 Maule J at 231D, Tindal LCJ at 233B

¹⁵ Ibid at 230, I

¹⁶ Ibid at 231, B

¹⁷ Ibid at 231, C

¹⁸ Ibid at 231, E

Maule offers, what he seems to consider, an unsatisfactorily answer to question one. He claims his answer cannot cover all the legal issues that arise: 'I am quite unable to do so, and, indeed, doubt whether it be possible to be done'.¹⁹

Maule makes it clear that he has no sympathy with the question which he answers:

only so far as it comprehends the question whether a person circumstanced as stated in the question, is, for that reason only, to be found Not Guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding.²⁰

His answer to the question is that such a person is responsible for his crime(s). According to Maule the test of insanity is based on the issue of knowing right from wrong. This test applies however deluded a belief system might be held by the defendant. On the issue of expert evidence Maule is of the view that this will entirely depend on a variety of issues, not just the facts of the case. He declines to give a firm answer to this question.

Maule's dissenting opinion seems, to say the least, sceptical of the political purpose behind the questions put to the judges. His opinion is interesting for what it has to say about an eminent Victorian judge's view of a politically based inquiry into the meaning and purpose of the common law plea of insanity. He emphasises the importance of the judge's role in advising the jury on how the law applies to the facts. He is clear that the reason he does not wish to see the law formalised is because he thinks it will interfere with this role:

there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.²¹

On the subject of the use of expert evidence he is similarly clear. It should be admitted when it is required by the circumstances of the case:

... though the person has never seen the person before the trial, and though he has merely been present and heard the witnesses. These circumstances, of his never having seen the person before, and of his having merely been present at the trial, are not necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful,²²

He draws authority from this statement from the actual trial of *R v Daniel M'Naughten*²³. The tone of his dissenting opinion is that the common law is a flexible tool. It allows judges to work from principle and to advise juries in a flexible manner appropriate to doing justice in individual cases working from accepted principles. Neither his opinion nor the opinion of the majority set out below suggests that the answering of the questions put by the politicians would alter the underlying law on insanity. Where the opinion of the majority differs is in suggesting an instruction that could be given to juries.

¹⁹ Ibid at 231, H

²⁰ Ibid at 231, H-I

²¹ Ibid at 232, D

²² Ibid at 232, F

²³ A report of the proceedings may be found in the Proceedings of the Old Bailey Reference Number: t18430227-874. In the report the spelling is M'Naughten whereas in the All England Reports it is M'Naghten

M’Naghten Rules: the presumption of sanity

The opinion of the majority of the judges was given by Tindal LCJ. Like Maule J. they object to being asked to give their opinion as to the application of the law. They also state that they would have preferred to hear legal arguments concerning the defence of insanity presented in an adversarial context. They conclude that it is their duty as judges to ‘declare the law upon each particular case’. In view of this they state clearly that their answers do not alter the general law in terms of insanity but are specific to the law relating to those afflicted by insane delusions. More particularly their opinion as to the law focuses on those defendants who suffer from ‘partial delusions only, and are not in other respects insane’.²⁴ The answer in this respect to the first question: regarding those acting ‘under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or producing some supposed public benefit’²⁵ where the defendant knew that his acts were contrary to the law is answered directly: ‘he is nevertheless punishable according to the nature of the crime committed’.²⁶

The answer given by Tindal to the question as to the proper instructions to be given to the jury and the questions to be submitted to the jury for their consideration when a defendant claimed to be ‘afflicted by an insane delusion’ has become known as the M’Naghten Rules. In giving this answer he specifically addresses the second and third questions posed by the House of Lords. The second was:

What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?²⁷

The third question asked: ‘In what terms ought the question to be left to the jury as to the prisoner’s state of mind at the time when the act was committed?’²⁸ The answer to these questions was given as follows:

jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.²⁹

Clarification is given by Tindal to the interpretation and application of the jury instruction in particular circumstances and some of that clarification is noteworthy. Firstly, he makes it clear that the requirement with regard to knowing that ‘he was doing what was wrong’ as employed by judges in such cases related to knowledge of the distinction between right and wrong. He comments that when put in this manner there was rarely any difficulty for juries. The relevant question for the jury was whether the accused ‘was conscious that the act was one that he ought not to do, and if that act

²⁴ N10 at 233, E

²⁵ Ibid at 233, E

²⁶ Ibid at 233, F

²⁷ Ibid at 233, G

²⁸ Ibid at 233, H

²⁹ Ibid at 233, I

was at the same time contrary to the law of the land, he is punishable'³⁰. Tindal remarks that the usual practice has been to frame the jury question in terms of whether 'the party accused had a sufficient degree of reason to know he was doing an act that was wrong'.³¹ This question was to be put in relation to the criminal act with which the defendant is charged.

This response links to the majority's answer to the fourth question: 'If a person under an insane delusion commits an offence in consequence thereof, is he thereby excused?'³² Their answer is that the accused must be treated as if the delusion were real. Tindal gives the following example:

if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.³³

Finally, with regard to the provision of expert evidence; the majority of the judges are of the opinion that the scientific view is acceptable in such cases, but only where the expert is not answering issues raised on the facts which could and should be answered by the jury. The majority opinion is critical of the terms in which the question is posed suggesting that it would only be acceptable if the facts were not disputed. As in such a case: 'the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.'³⁴

What was the effect of M'Naghten's case?

There is a strong implication that, following this statement of the law in relation to insanity, delusional beliefs would only found an insanity defence in prescribed circumstances. Where the delusional belief provided an explanation for why the defendant felt his specific act was not wrong the plea might succeed. For example, where the delusion related to the need for self-defence the insanity plea might succeed. But, wrongness in this sense did not extend to his reasons for acting, in other circumstances, unless they were relevant to his understanding of the nature and quality of his physical act. Thus a delusional belief in the need for redress or revenge could not support a claim that the criminal act was not wrong. If this interpretation had been applied in M'Naghten's case it seems likely that Daniel M'Naghten would have struggled to gain an acquittal. However, where insanity, unrelated to delusional beliefs of such a specific type and nature, was claimed the assumption must be that the old law in relation to insanity held true.

The old law was based on the common law as set out in Hale's History of the Pleas to the Crown. Hale wrote of the difficulty of identifying insanity, and how the onus was upon the judge and jury to weigh the circumstances of the crime and the plea. '[L]est on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes'. The most helpful measure Hale concluded was to ask the question whether the accused had 'ordinarily as great understanding, as ordinarily a child of fourteen years hath.' If he did, he was not insane.³⁵ There is a suggestion from the answers given by the judges in M'Naghten's case

³⁰ Ibid at 234, B

³¹ Ibid at 234, B-C

³² Ibid at 234, C

³³ Ibid at 234, E

³⁴ Ibid at 234, H

³⁵ Sir Matthew Hale, *Historia Placitorum Coronæ*, The History of the Pleas of the Crown, Chapter IV, (1680) 30 both quotations

that by the 1840's this definition of insanity had come to be interpreted by common law judges and explained to juries in terms of the ability of the accused to reason, or to be conscious that the act was one which he did not know he ought not to do.

The use of the defence of insanity and the application of the rules in the later part of the 19th century is variable. On occasion the defence was rejected, but the judge expressed concern about the outcome. Additionally, where public sentiment was engaged, then the judge's conduct of the trial was often heavily scrutinised. Townley's case is a good illustration of both points.³⁶ Townley killed his fiancée when she asked to be released from their engagement so that she could marry someone else. Townley pleaded insanity but, following a direction in accordance with the M'Naghten Rules, the defence failed and he was convicted of murder by the jury. However, the judge then wrote to the Home Secretary drawing to his attention the fact that at the trial medical opinion had supported an insanity plea. The Home Secretary had the matter investigated by the Commissioners in Lunacy. The result was that Townley had his sentence commuted to penal servitude and thus avoided the hangman's noose.³⁷ As in M'Naghten's Case, there was public outcry at the perceived leniency of this revised sentence. The Saturday Review commented: 'What the defence seems to come to is this: - That the greater the rogue a man is, the more entirely is he free from responsibility.'³⁸

The developing law

However, this does not mean that in all insanity cases the judges stuck rigidly to the M'Naghten rules when advising juries. James Fitzjames Stephen³⁹ was responsible, later in his life, as the presiding judge, in the trial of *R v Davis* for an extremely flexible interpretation of the M'Naghten Rules. He informed the jury that the test to be applied in this case to the plea of insanity was the M'Naghten Rules, but his direction to the jury was as follows:

As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness and wrongness of an action ... may fairly be said to prevent a man from knowing that what he did was wrong. ... Both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him ... If you think there was a distinct disease caused by drinking, but different from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the grounds of insanity.⁴⁰

A stricter approach was adopted to the interpretation of the M'Naghten Rules in the first part of the 20th century. *R v Codère*⁴¹ considered the common law regarding the meaning of what became referred to as the first limb of the M'Naghten Rules. The Court of Appeal was asked to consider and refused to draw a distinction between 'nature' and 'quality' of a criminal act in the application of the rules. The argument which was put to the court was that 'quality' referred to the moral quality of

³⁶ *R v Townley* (1863) 3 F & F 839, (1863) 176 ER 384.

³⁷ Roger Smith, *Trial by Medicine*, (1981) Edinburgh University Press, 132.

³⁸ The Saturday Review 16 (1863) 776-7

³⁹ Sir James Fitzjames Stephen was a distinguished judge and writer on criminal law: see in particular his books *A General View of the Criminal Law of England* first edition, 1863 and *A History of the Criminal Law of England* (three volumes), (London, 1883). For assessments of his life and work see: KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 1988) and SJ Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, *Ohio St J Crim L* 5 (2007) 505 - 522

⁴⁰ *R v Davis* (1881) 14 Cox CC 563 (CrCt)

⁴¹ (1917) 12 Cr App R 21 (CCA)

the act. Lord Chief Justice Reading giving his opinion said: 'that in using the language 'nature and quality' the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act.'⁴²

Ruling out irresistible impulse

In *R v True*⁴³ the Court of Appeal had reason to examine the status of the M'Naghten Rules again. The court considered what the legal approach should be where the only evidence put forward at trial was that at the time of the criminal offence True was 'certifiably insane'. It was argued on behalf of True that the appropriate verdict after the trial should have been a Special Verdict under the Trial of Lunatics Act 1883. Evidence provided to the appeal court showed that all four medical witnesses were in agreement that the defendant was insane. The Crown had not called medical evidence to dispute these findings. A point at issue was the status of the M'Naghten Rules; it being claimed that medical science had made considerable advances since the rules were framed, nearly eighty years earlier.

A further point for consideration by the court was a reinterpretation of the rules which had appeared in the 1904 edition of Stephen's Criminal Digest.⁴⁴ The argument was made on behalf of the appellant that this gave recognition to a defence of irresistible impulse. The quotation submitted for consideration by the court was:

No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power or] by any disease affecting his mind (a) from knowing the nature and quality of his act or (b) from knowing that the act is wrong; [or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default].⁴⁵

In the Court of Appeal, Lord Chief Justice Hewart refers to a note attached to the quotation that states that the words within the brackets are said to be 'doubtful'.⁴⁶ The appeal court heard evidence that the direction given in *Davis* by Stephens J. reflected accepted law and had been followed in three subsequent cases.⁴⁷ The issue was also said by counsel for the appellant to have been reviewed by Lord Chief Justice Alverstone in *R v Jones (Victor)*⁴⁸ where it was claimed that he recognised that 'loss of self-control, through mental disease, might be a possible ground of excuse; and left the question open for future consideration.'⁴⁹

This was one of the issues that had to be decided on appeal in *True*. Hewart LCJ gave the judgment of the court. He reviewed the status of the medical evidence that the accused was insane at the time of the commission of the act. The argument on behalf of the appellant was that as this evidence was uncontested by the Crown the jury were bound to accept it. This argument was rejected by the Court of Appeal on the grounds that the jury was entitled to reach a decision based on the whole facts before them. Also rejected was the contention that there was a need to extend the ambit of

⁴² Ibid at 27

⁴³ (1922) 16 Cr App R 164 (CCA)

⁴⁴ Stephen's Criminal Digest 6th edn (1904)

⁴⁵ N43, 165. The passage quoted being taken from page 21 of n44

⁴⁶ N43, 165

⁴⁷ *R v Hay* (1911) 22 Cox CC 268, 75 JP 480 (CCC); *R v Fryer* (1915) 24 Cox CC 403 (Assizes); and in *R v Jolly* (1919) 83 JP 296 (Assizes). In *R v True* the inclusion of *R v Hay* was disputed by the Crown as being an inaccurate report of the proceedings.

⁴⁸ (1910) 4 Cr App R 207 (CCA)

⁴⁹ N43, 165-6.

the M’Naghten Rules to include cases where the accused was ‘deprived of the power of controlling his actions.’⁵⁰

Legally or morally wrong?

A further clarification with regard to the ambit of the rules came in *R v Windle*,⁵¹ a case where the meaning of the second limb of the rules was considered. The appeal court confirmed that the limb of the rules which states: ‘if he did know it, that he did not know he was doing what was wrong’⁵² should receive the following interpretation: the knowledge required was knowledge of legal not moral wrong.⁵³ This interpretation appears much more prescriptive and limiting than that originally given by Tindal LCJ.⁵⁴ In 2007 the Court of Appeal were asked to revisit the issue of the applicability of the rules and in particular this limb of the rules in *R v Dean Johnson*.⁵⁵ What the court said about the rules is informative:

It is to be remembered that the whole basis of what are described as the M’Naghten Rules in the answers given by the judges to a series of questions from the House of Lords which they dealt with without, it would appear, any argument by counsel. It has always been recognised that the M’Naghten Rules, accordingly, are rules which have to be approached with some caution.⁵⁶

The court supported the interpretation of Lord Chief Justice Goddard in *Windle* that the knowledge of wrong referred to the issue of whether the defendant knew his criminal act was legally wrong. But they expressed strong reservations concerning the M’Naghten Rules. Johnson’s appeal is dismissed but the appeal court states: ‘[T]his area, however, is a notorious area of debate and quite rightly so. There is room for reconsideration of rules and, in particular, rules which have their genesis in the early years of the 19th century.’⁵⁷

A place for neuroscience?

This approach narrowed the question posed by the second limb of the rules. The defect of reason in relation to the rightness of wrongness of the act became a purely cognitive test. Did this defendant know the act was against the law? *Windle* also, by implication, confirmed the applicability of the rules to all cases of insanity. The judges, in answering the questions posed by the House of Lords following M’Naghten’s case, had been clear that their answers related only to partial delusions and did not extend to cases of insanity more generally. It is therefore not surprising that research into the use of neuroscientific evidence in court by defendants in criminal cases showed that no neuroscientific evidence had been adduced in support of this second limb.⁵⁸

⁵⁰ Ibid 169-170

⁵¹ [1952] 2 QB 826 (CCA)

⁵² N29 and accompanying text

⁵³ Goddard LCJ giving the judgment of the Court of Appeal states: ‘There is no doubt that the word “wrong” in the M’Naghten Rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified.’ N51, 3.

⁵⁴ See n29 and accompanying text

⁵⁵ [2007] EWCA Crim 1978, [2008] Crim LR 132

⁵⁶ Ibid [14] per Latham LJ (V-P)

⁵⁷ Ibid [24] per Latham LJ (V-P)

⁵⁸ Catley P and Claydon L, The use of neuroscientific evidence in the courtroom by those accused of criminal offences in England and Wales, *Journal of Law and Biosciences*, (2015) doi:10.1093/JLB/LSV025. This research focussed on the use of neuroscientific evidence by defendants in reported criminal cases between 2005 and 2012. Although 204 cases were found in which those accused of criminal offences made use of neuroscientific evidence, none of those cases were cases where the insanity defence was pleaded.

Given the mechanistic nature of the definition of the first limb of the rules it is surprising that little trace of expert evidence of a neurocognitive nature, explaining how action is experienced, has been recorded relating to this limb. This relationship was canvassed in *R v Burgess*.⁵⁹ Peter Fenwick, a neuropsychiatrist made the following argument:

Dr Fenwick, whose opinion was that this was not a sleepwalking episode at all. If it was a case where the appellant was unconscious of what he was doing, the most likely explanation was that he was in what is described as a hysterical dissociative state. That is a state in which, for psychological reasons, such as being overwhelmed by his emotions, the person's brain works in a different way. He carries out acts of which he has no knowledge and for which he has no memory.⁶⁰

The Court of Appeal accepts this evidence in rejecting Burgess' appeal against the refusal of the trial judge to put non-insane automatism to the jury. The insanity verdict was upheld. The main ground for this was not the neurocognitive explanation of the behaviour but on the law's distinction between external and internal causes of behaviour.

Further problems in interpreting the rules: the defence of automatism.

In the introduction, the problem of the distinction between insane and sane automatism was canvassed; and is worthy of exploration in more detail. The first references to automatism occur in case law about the turn of the 19th/20th Century. In the record of trials from the Old Bailey,⁶¹ two trials contain reference to a plea of insane automatism based on medical evidence of epilepsy. These are two murder cases: Harry William Ball tried in 1910⁶² and William Henry Philpot tried in 1912.⁶³ Ball succeeded in establishing a defence of insanity raising sufficient doubt in the mind of the jury to gain a guilty but insane verdict. The case report records much of the evidence given at trial and is remarkable because Ball's defence succeeds despite his actions in shooting the victim being witnessed: and, from the report given by the witnesses at trial and under cross examination, seemingly being purposeful acts. There is a significant amount of medical evidence supporting the defence and prosecution cases and the eminence of one of the medical experts for the defence⁶⁴ may explain why the plea is successful.

The use of the automatism defence and its relationship with epilepsy was further considered in *Bratty v Attorney General for Northern Ireland*.⁶⁵ Bratty's defence team employed evidence relating to psychomotor epilepsy to argue a number of defences to a charge of murder. Three arguments were made at trial by the defence. The first was that Bratty was in a state of automatism at the time of the killing. The legal argument made to support this claim was that the

⁵⁹ [1991] 2 QB 92 (CA)

⁶⁰ Ibid 776

⁶¹ A report of the proceedings may be found at Proceedings of the Old Bailey Reference No: [t19100718-27](#)

⁶² Ball was tried on July 20th 1910 before Ridley J.

⁶³ Philpot was tried on February 1st 1912 before Ridley J. Philpot's claim that he was in an automatic state failed. He was found to have been sane at the time of the killing. Interestingly the jury found that Philpot acted in a fit of temper "without intention of killing". The judge pressed the jury on what they meant by "without intention of killing". The foreman of the jury explained that the jury "unanimously and emphatically" considered the accused "did not realise the consequences of what he was doing". The jury were asked to reconsider their verdict. The jury's reformulated verdict was: "We find that the prisoner killed his wife, and very strongly recommend him to mercy." Philpot was sentenced to death. A report of the proceedings may be found at Proceedings of the Old Bailey Reference No: [t19120130-53](#)

⁶⁴ Theophilus Hyslop MD, senior physician Bethlem Royal Hospital, Lecturer on Mental Diseases St. Mary's Hospital and London School of Medicine.

⁶⁵ [1963] AC 386 (HL)

Crown must prove beyond reasonable doubt that the 'acts constituting the crime charged were conscious and voluntary acts'.⁶⁶ Secondly, that Bratty was incapable of forming the relevant mens rea due to his impaired and confused state of mind. Thus the defence argued, in the alternative, that the appropriate verdict was guilty of manslaughter and not murder. Finally, if the first two were rejected, the jury should consider the insanity defence.⁶⁷ The judge put the defence of insanity to the jury but declined to ask the jury to consider a manslaughter verdict or the defence of automatism. Factually there was no dispute that he had strangled his victim with her own stocking but he claimed to have no memory of the events. Bratty was convicted of murder. Bratty appealed to the Court of Criminal Appeal in Northern Ireland regarding the judge's refusal to put the defence of automatism or the defence's legal argument regarding manslaughter to the jury. The Court of Criminal Appeal rejected this appeal. He then appealed to the House of Lords.

The House of Lords considered the relationship between insanity and automatism in some detail. The Lord Chancellor Viscount Kilmuir accepted that legal authority⁶⁸ required that the prosecution prove that the voluntary act of the accused killed the victim. The main issue considered in his opinion was how that argument should be made in court. Should the prosecution have to show that the act was voluntary once the accused asserted that the act was not voluntary? If evidence was required, what was the burden and where was it to be placed to establish the automatism defence? Should the burden be the same as in insanity cases where the burden rested on the defence? Furthermore how should the two defences be argued when the automatism defence rested on medical evidence that might also point towards an insanity verdict?⁶⁹

Kilmuir answers the questions with regard to the overlap between evidence of insanity and evidence of automatism by saying that there needed to be sufficient evidence of confusion and lack of voluntariness to provide the evidential foundation for an automatism defence. He agreed with the trial judge that in Bratty's case there was no such evidence to place before the jury.⁷⁰ Kilmuir confirms that, in his view, the basis of the plea of automatism is to be found in common law principles regarding what must be established by the prosecution beyond reasonable doubt at trial. One of these principles was stated by Lord Sankey in *Woolmington* as requiring that the prosecution must establish that the criminal act resulted from 'a voluntary act of the accused'.⁷¹ Kilmuir states that once there is sufficient evidence to raise the issue of automatism then, if:

the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary mens rea - if indeed the actus reus - has not been proved beyond reasonable doubt.⁷²

⁶⁶ Ibid at 392

⁶⁷ Ibid

⁶⁸ Ibid at 407 where Kilmuir refers to *Woolmington v DPP* [1935] AC 462. In *Woolmington* Lord Sankey states: 'the Crown must prove (a) death as a result of a voluntary act of the accused' at 482. Earlier in his opinion Sankey says: 'All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which a jury may, not must, find him guilty of murder.' at 480

⁶⁹ The issue with regard to burden of proof will be considered later when examining the reform proposals

⁷⁰ N65, 406 Kilmuir refers to Devlin LJ's statement in *Hill v Baxter*: 'Unless there was evidence that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.' [1958] 1 QB, 277, 285 (QB)

⁷¹ *Woolmington v DPP* [1935] AC 462, 482 (HL)

⁷² N65 at 407

Lord Denning in his opinion gave a further gloss to these arguments attempting to define automatism in a manner which has been widely cited in subsequent case law:

No act is punishable if it is done involuntarily; and an involuntary act in this context - some people nowadays prefer to speak of it as “automatism” - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.⁷³

In Denning’s view there were two parts to the automatism defence: one which seemed confined to situations where the muscles brought about action but there was no mental control of the resulting movement; and a second where the actor was not conscious of controlling the physical action. Both definitions were to prove problematic; the second even more problematic than the first. Regarding whether physical acts resulting from muscle movements may be differentiated and reported by an agent in the manner described by Lord Denning is to say the least contentious. It has led to considerable discussion of what it means to act voluntarily.

Neurocognitive perspectives on voluntariness

Neurocognitive research suggests that our ability to describe how we bring about basic actions when we are conscious is limited. The description of what distinguishes voluntary actions from stimulus determined actions in a scientific sense is challenging. Haggard in search of a scientifically satisfying description of voluntary action attempts to refine what may be viewed as the dualistic descriptions of ordinary language and writes:

A scientifically more satisfactory approach defines voluntary action by contrasting it with more stimulus-driven actions: voluntary action lies at one end of a continuum that has simply reflexes at the other end. Thus, whereas reflexes are immediate motor responses, the form of which is determined by the form of stimulation, the occurrence, timing and form of a voluntary action are not directly determined, or at best are only very indirectly determined, by any identifiable external stimulus.⁷⁴

Complex relationships

The relationship between automatism, insane automatism and insanity became increasingly complex after the cases of *R v Quick*⁷⁵ and *R v Sullivan*⁷⁶. In *Quick* the distinction between sane and insane automatism was said to be dependent on the identified legal cause of the automatism being deemed to be external or internal. In *Quick* the cause was the failure to take food after an insulin injection to control diabetes. This cause was said to be external to the accused and therefore to be able to found a defence of sane automatism. Whereas, in *R v Hennessy*,⁷⁷ the failure of a diabetic to take insulin meant that the underlying, legally relevant, cause of his behaviour was deemed to be

⁷³ Ibid at 409 Lord Denning’s definition of automatism in Bratty has been widely referred to in the case law of other jurisdictions. For example *R v Burr* [1969] NZLR 736; *State v Caddell* 215 SE 2d 348 (NC 1975); *Rabey v The Queen* [1980] 2 SCR 513; *Fulcher v State* 633 P 2d 142 (Wyo 1981); *Queen v Falconer* (1990) 171 CLR 30; *Ross v HM Advocate* 1991 SLT 564; *R v Parks* [1992] 2 SCR 871; *McClain v State* 678 NE 2d 104 (Ind 1997); *R v Stone* (1999) 134 CCC (3d) 353.

⁷⁴ Haggard P. Human volition: towards a neuroscience of will, *Nature Reviews Neuroscience*, 2008, 9, 934-946, 934

⁷⁵ N6

⁷⁶ [1983] 2 All ER 673 (HL)

⁷⁷ [1989] 1 WLR 287 (CA)

internal, his diabetes. Thus despite some external factors, stress anxiety and depression being evidenced, the actual legal cause of the behaviour was a disease: diabetes.

The House of Lords in *R v Sullivan* considered the issue of the divide between insanity and automatism in greater detail. Sullivan committed an assault on a friend during the post ictal phase of a seizure caused by psychomotor epilepsy. The issue on appeal was whether Viscount Kilmuir's definition of automatism in *Bratty* entitled a defendant, such as Sullivan, to an automatism defence - or was the only available defence insanity? Key to this distinction was the meaning of disease of the mind in the M'Naghten Rules. The House of Lords' opinions were unanimous. The main opinion being given by Lord Diplock, who reasoned that, if the evidence before the court concerned what the law would view as a disease of the mind, any question with regard to the voluntariness of action should be considered as a plea of insanity.⁷⁸ Lord Diplock also affirmed the M'Naghten Rules as having general application in cases of insanity and not being restricted to cases of insane delusions.⁷⁹ The issue to be considered by the House of Lords was whether someone who 'whilst recovering from a seizure due to psychomotor epilepsy and who did not know what he was doing when he caused such harm and has no memory of what he did should be found not guilty by reason of insanity.'⁸⁰ Diplock argued that even cases of 'temporary' insanity should fall within the rules.⁸¹ He went on to state that to provide evidence of insanity the defence had to provide evidence to establish a disease of the mind which would demonstrate impairment of the following 'mental' faculties: reason, memory and understanding.⁸²

This interpretation of insanity effectively meant that the insanity defence had become incredibly technical, difficult to argue and of limited attractiveness to a criminal defence team. The test had become a test of cognitive understanding and the legal definition of insanity as encompassed by the rules had removed many recognised mental disorders which relate to volitional impairment rather than cognitive impairment from the insanity defence. Thus a defendant who has sufficient understanding to recognise the physical nature and quality of the criminal act and has some comprehension that it was legally wrong, even if s/he believed it to be morally appropriate, on a strict application of the M'Naghten Rules cannot be legally insane.

Concerns regarding the underuse of the defence

In reviewing the current law consideration has been given to the fact that little reference is made to neuroscientific evidence. In a sense as the law is based on old cases one cannot expect to find modern scientific understanding used in evidence to support or to disprove insanity or automatism pleas. Thus most comment in this chapter regarding neuroscientific findings is confined to the review of the reform proposals. The need for law reform in this area is pressing not the least because there is considerable evidence that the defence is underutilised.

Research covering the period from 1997-2001 put the number of successful insanity pleas in that four year period as 72.⁸³ The Law Commission for England and Wales commissioned further research in preparation for the review of the insanity defence. This research revealed that there were 223 successful pleas of insanity in the period between 2002 and 2011.⁸⁴ The research found that the use

⁷⁸ N76 at 677

⁷⁹ Ibid at 676

⁸⁰ Ibid

⁸¹ Ibid at 678

⁸² Ibid at 677

⁸³ R D Mackay, B J Mitchell and L Howe, 'Yet More Facts about the Insanity Defence' [2006] *Crim LR* 399, 400

⁸⁴ R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*. Work commissioned by the Law Commission, paras E.5 and E.6. of Appendix E of N3

of the defence fluctuated throughout this period. In the materials supporting the original Scoping Paper issued by the Law Commission an attempt was made to assess the number of defendants facing trial in the Crown Court who might be expected to be suffering from serious mental disorders at the time of the crime. Such a figure is hard to compute. However, the Commission sought to include within the Insanity and Automatism Supplementary Material to the Scoping Paper an informed guess as to the number of those suffering from a serious mental disorder that might be tried for a criminal offence(s) in the Crown Court. It was estimated that 10% of the prison population suffered from serious mental illness.⁸⁵ Whilst it is accepted that the criminal law definition of insanity does not equate to medical ascriptions of serious medical illness, this 10% figure still contrasts starkly with the fact that only 0.03% of defendants⁸⁶ in any one year were able to mount a successful insanity defence. This would seem to contrast with the situation in 1843. Maule J refers to the fact that the questions posed by the House of Lords “relate to matters of criminal law of great importance and frequent occurrence”. By this he is presumably meaning that claims of insanity were frequent.

A variety of reasons are suggested to be the cause of this. These include the diversion of offenders from trial by means of the fitness to plead provisions, or gaps in the data accessed for the research. Some of the possible reasons put forward for the failure to plead insanity are of concern. ‘Some of those who plead guilty do so because of a mental disorder’.⁸⁷ Defendants who could raise the defence do not plead insanity.⁸⁸ Some who have a serious mental disorder at the time of the crime are unable to plead insanity because the legal definition of insanity means they simply cannot fit within the defence as defined at present.⁸⁹ Finally there is particular reference to defendants who suffer from a learning disability.⁹⁰ At present these defendants are not caught within the ambit of the insanity defence unless their IQ falls below 70.^{91 92}

There are many good reasons why one might wish to see those who suffer from serious mental disorders identified. This should improve the manner in which they are treated by the Criminal Justice System. Implicitly the common law requires culpability to depend on proof of the ability of an individual to make their behaviour conform to the requirements of the criminal law. The present defences of insanity and automatism recognise that there are varying degrees of responsibility for actions. If someone is mentally disordered then their ability to adjust their behaviour may be severely compromised. Furthermore, if someone is seriously mentally disordered then the justice system may view them as less culpable but may wish to assess the risk of their problematic criminal behaviour recurring. Identifying before trial that a defendant may be seriously mentally disordered allows the justice system the opportunity to offer a fair hearing. If the law is formulated correctly then appropriate evidence may be called and a proper evaluation made by the jury of the guilt or innocence of the accused. These propositions are embraced by the Law Commission in the approach they take in the Discussion Paper outlining how debate in the area should proceed.

The Law Commission’s Proposals: The Proposed New Defence

⁸⁵ N3, 3.32

⁸⁶ Ibid

⁸⁷ Ibid (3)

⁸⁸ Ibid (4)

⁸⁹ Ibid (5)

⁹⁰ Ibid (7)

⁹¹ *R v Masih* [1986] *Crim LR* 395 (CA)

⁹² The requirement that a defendant must have an IQ of under 70 to be classed as insane is much more stringent than the old approach set out by Hale see n35 that a person was not insane if he had the understanding of a 14 year old.

It is interesting to note that the Law Commission has published its proposals in what is termed a 'Discussion Paper'.⁹³ Furthermore their conclusions and proposals are described as 'provisional'.⁹⁴

The Law Commission proposes the abolition of the common law defence of insanity⁹⁵ and the creation of a new defence of not criminally responsible by reason of a recognised medical condition.⁹⁶ The new defence has obvious advantages in that it avoids the stigma of the term insanity and avoids the problem of inappropriately labelling those who are for example diabetic or sleepwalkers as insane. The proposed terminology also has the advantage that it avoids the focus on guilt evidenced in the phrase 'not guilty by reason of insanity' or the earlier phrase 'guilty, but insane'. To satisfy this new defence the defence:

must adduce expert evidence that at the time of the alleged offence the defendant wholly lacked the capacity:

- (i) rationally to form a judgment about the relevant conduct or circumstances;
- (ii) to understand the wrongfulness of what he or she is charged with having done;
- or
- (iii) to control his or her physical acts in relation to the relevant conduct or circumstances

as a result of a qualifying recognised medical condition.⁹⁷

Three limbs not two

The three limbs to the proposed new defence adopt a different approach from that advanced by the M'Naghten Rules as interpreted by subsequent case law.

The first limb focuses on rationality and the ability to form a judgment about relevant conduct or circumstances. This focus stems from the idea of having capacity for practical reasoning.⁹⁸ The reference to rationality in the first limb might be seen as mirroring the statement in the M'Naghten Rules that a man should be 'presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their [i.e. the jury's] satisfaction'.⁹⁹ However, the proposed new defence does not contain the additional requirements set out in the M'Naghten Rules and subsequent case law as to how the defence must be made out.¹⁰⁰ Under the

⁹³ Section 3A of the Law Commissions Act 1965, as amended by section 1 of the Law Commission Act 2009, places a duty on the Lord Chancellor to report to Parliament each year on the extent to which the Law Commission proposals have been implemented by the Government. Where proposals are not implemented the report should identify any plans for dealing with the proposal (s3A (1) (a) (i)) and where the proposals are not to be implemented must give reasons for that decision (s3A (1) (a) (ii)). By labelling the document as a Discussion Paper, labelling their proposals as 'Provisional Proposals' and not including within the document a draft Bill the proposals would appear to fall outside the definition of a Law Commission proposal contained in s3A (1) (6). Accordingly, no statement from the Lord Chancellor will be required from the Law Chancellor will be required if the Government fails to implement the proposals set out in the Discussion Paper.

⁹⁴ See for example chapter 10 headed 'Our Provisional Conclusions and Proposals'. Although the 18 proposals contained in the chapter are identified as 'proposals', 15 of the 18 open with the words '[W]e provisionally conclude ...'. Hereafter in this chapter reference will be made to Law Commission proposals, however it should be remembered that the proposals are 'provisional'.

⁹⁵ N1 Proposal 1, paras 4.158 and 10.6

⁹⁶ Ibid Proposal 2, paras 4.159 and 10.7

⁹⁷ Ibid Proposal 3, paras 4.160 and 10.8

⁹⁸ Ibid Conclusion 3, para 10.3

⁹⁹ All ER Rep [1843-60] 229, 233, I

¹⁰⁰ As discussed earlier the M'Naghten Rules additionally require for a successful plea of insanity that 'it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a

new proposed defence a defendant would be able to satisfy the requirement if she 'wholly lacked the capacity ... rationally to form a judgment about the relevant conduct or circumstances' even if she did know the physical nature and quality of her act or did know that what she was doing was wrong. She would satisfy this first limb so long as the reason that she wholly lacked the capacity was as a result of the recognised medical condition.

The second limb focuses on understanding the wrongfulness of the alleged criminal act. Again it may be seen as mirroring the M'Naghten Rules in that the Rules refer to not knowing he 'was doing what was wrong'. As has been seen this has been interpreted narrowly by subsequent case law¹⁰¹ as meaning what was legally wrong. However, the Law Commission are seeking in their proposals an alternative interpretation.

In Canadian case law, the accused need only appreciate that the act was something he or she ought not to do.¹⁸ This approach leaves it open to show that the accused knew the act was against the law, which signals that it is generally thought of as wrong, but does not limit awareness of wrongfulness to awareness of illegality (as English case law does). We think this is an approach we should follow.¹⁰²

This adoption of the Canadian approach can also be seen as a reversion to the earlier English approach.¹⁰³ This is an important distinction. By focussing on the appreciation of the defendant as to what she ought not to do, the new proposed defence is potentially much wider. A defendant suffering from a delusion could realise that what she was doing was legally wrong, but could nevertheless not consider it wrong in the sense that it was something that she ought not to do. There is nothing to suggest that Daniel M'Naghten, for example, did not know that it was legally wrong to kill. However, in his deluded state it is possible that he did not think it was wrong to fire the fatal shot, in the sense of appreciating that it was something that he ought not to have done.

The third limb relates to inability to control physical acts. This links less obviously to the M'Naghten Rules as initially set out in response to the questions of the House of Lords, but does link to the line of cases which have developed the idea of insane automatism. Those whose actions are involuntary from an internal cause and who are currently classed as insane would in many cases fall within the category of those whose inability to control their actions arose from a recognised medical condition.

The Law Commission explain the rationale behind the proposed reforms as follows:

Our principal conclusion is that people should not be held criminally responsible for their conduct if they lack the capacity to conform their behaviour to meet the demands imposed by the criminal law regulating that conduct. This lack of capacity might consist in an inability to think rationally, or in an inability to control one's actions. The reason for that lack of capacity might lie in a mental disorder, or in a physical disorder.¹⁰⁴

Whilst this rationale might seem particularly relevant to the first and third limbs of the proposed new defence, in reality an inability to think rationally would also cover the situation where a defendant was unable to understand the wrongfulness of the act.

defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.' Ibid

¹⁰¹ N51

¹⁰² N1 Para 4.22. The Law Commission also refer in the footnote (footnote 18) to a similar approach being adopted by s27 of the Criminal Code of Queensland.

¹⁰³ See for example *R v Davis* n40 and accompanying text.

¹⁰⁴ N1 Appendix A. The question of criminal responsibility, para A. 5.

All three limbs are built on a requirement that the defendant ‘wholly lacked the capacity’ to comply with the particular limb. This links to the proposed rationale behind the defence that ‘people should not be held criminally responsible for their conduct if they lack the capacity to conform their behaviour to meet the demands imposed by the criminal law regulating that conduct.’¹⁰⁵ Substantial or partial impairment of capacity will not suffice. Whilst the rationale for this requirement is clear, it leaves the defendant who finds it exceptionally difficult to conform her behaviour to the criminal law’s requirements without a defence. A defendant with greatly reduced impulse control because, for example, of damage to the pre-frontal cortex of the brain might find it very difficult to control her acts, but if she could not show that she ‘wholly lacked the capacity ... to control ... her physical acts’ she would be denied the defence. Arguably from a legal viewpoint this approach is correct. Those who have impaired capacity do, by definition, have some capacity even if that capacity is very substantially impaired. Such defendants, following conviction, may hope that their reduced blameworthiness will lead to a more lenient sentence. However, the converse could apply. If their reduced ability to conform their behaviour to the requirements of the law persists, this may lead a court to conclude that they are particularly dangerous and therefore lead to the imposition of a lengthier sentence.¹⁰⁶

A neurocognitive case study

Neuroscience is at the heart of Burns and Swerdlow’s clinical case report¹⁰⁷ of an individual with a brain tumour is illustrative of the difficulty of determining whether an individual has impaired capacity, substantially impaired capacity or wholly lacks capacity to control his actions. In this case a 40 year old school teacher, who had no history of criminal activity, began collecting pornographic magazines, visiting internet pornography sites, soliciting prostitutes and then made ‘subtle sexual advances to his prepubescent stepdaughter’. He was convicted of child molestation and ordered to undertake an inpatient programme for sex addiction or go to jail. He attended the programme, but whilst on the programme he began seeking sexual favours from staff and other clients at the rehabilitation centre. He was expelled from the programme. The day before he was due to be sentenced to prison, he complained of a severe headache. By this stage he had additionally developed balance problems, walked awkwardly and was unconcerned when he urinated on himself. During a neurological examination, which followed the manifestation of this behaviour, he solicited female medical staff for sexual favours. MRI scans indicated that he had a large brain tumour ‘displacing the right orbitofrontal cortex and distorting the dorsolateral prefrontal cortex.’ The brain tumour was resected and his aberrant behaviour ceased. He walked normally, his balance returned, he no longer urinated on himself, no longer solicited sexual favours and no longer sought out pornography on the internet. He became able to complete various tests which, whilst the tumour was in place, he had been unable to undertake competently.¹⁰⁸ He successfully completed a Sexaholics programme and seven months later it was concluded that he no longer presented a threat to his stepdaughter and he was allowed to return to his home. Subsequently he developed a persistent headache and began secretly collecting pornography again. A further MRI scan was conducted, the tumour was found to have grown back again. The tumour was re-resected. Once again his behaviour ceased to be problematic.

¹⁰⁵ Ibid

¹⁰⁶ Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 2015, 56 *BCL Rev* 493. In this article Denno argues that the empirical evidence suggests that in the United States of America neuroscientific evidence is usually offered to mitigate punishment when sentencing. This is particularly true of death penalty trials.

¹⁰⁷ Jeffrey M. Burns & Russell H. Swerdlow, *Right Orbitofrontal Tumor With Pedophilia Symptom and Constructional Apraxia Sign*, *Arch Neurol*. 2003;60 (3):437-440. doi:10.1001/archneur.60.3.437

¹⁰⁸ Tests included his ability to write legibly, to draw a clock face and to copy various figures.

Reading the report it is clear that the man's behaviour went through phases. Initially he would appear to have been a respected, law abiding member of the community. He then began to behave in less socially acceptable ways, eventually culminating in criminal behaviour when he made sexual advances towards his stepdaughter. During this period he attempted to conceal his behaviour. This might suggest that he understood the wrongfulness of his actions. It does not, per se, mean that he could control his actions, though the fact that he was able to conceal his actions does suggest that he was able to control the timing of his actions so as to avoid detection. However, following conviction, whilst on the initial treatment programme it appears that he could not control his actions despite what is described in the report of his case as 'his strong desire to avoid prison'. Burns and Swerdlow report that: 'our patient could not refrain from acting on his pedophilia despite the awareness that the behaviour was inappropriate.' Applying the proposed new test the man would seem, at this stage, to have retained the ability to 'understand the wrongfulness of what he did'¹⁰⁹, but it is arguable that he lacked the capacity to control his physical acts.¹¹⁰

Burdens and standards of proof

The new proposed defence places an elevated evidential burden of proof on the defence.¹¹¹ Generally the evidential burden¹¹² means that the defendant must provide evidence on which to base the defence. If the defence does this, it is then for the prosecution to prove beyond reasonable doubt that the defence does not apply. In the case of this proposed defence the evidential burden is elevated and it is proposed that the defence be required to provide evidence from two experts to support the claim.¹¹³ The requirement for the defence to produce evidence from two experts exists in the current insanity defence; however there are two significant differences.

Firstly the present insanity defence involves a requirement that one of the experts should be a psychiatrist,¹¹⁴ whereas the proposed new defence would simply require one of the two experts to be a registered medical practitioner.¹¹⁵ This reflects the possibility explored in the Discussion Paper that the recognised medical condition might be a physical rather than a mental condition.¹¹⁶ This seems eminently sensible. The current law's requirement that an expert on mental disorders should be called when the 'internal' cause is for example diabetes or sleepwalking is odd. Under the current law not only are individuals being stigmatised by the application of the inappropriate label of insane, but the experts being called to support the application of that label are perhaps not necessarily the most appropriately qualified.

The second difference relates to the standard of proof. Under the current law, the defence are required to prove insanity on the balance of probabilities. The Law Commission notes the potential anomaly that the jury or magistrates may think on the balance of probabilities that the defendant is

¹⁰⁹ The second limb of the proposed new test.

¹¹⁰ The third limb of the proposed new test.

¹¹¹ N1 at para 4.135

¹¹² 'It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant' per Lord Bingham in *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 at [1].

¹¹³ N1 Conclusion 9, para 8.50.

¹¹⁴ Technically the requirement is that one of the experts is 'approved for the purposes of section 12 of the 1983 Act by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder' – see n1 para 7.36. In reality this generally means that the expert is a psychiatrist.

¹¹⁵ Proposal 8, para 4.165

¹¹⁶ For discussion of this see for example n1 paras 1.21, 3.18 and 4.36

not insane, but may have reasonable doubt as to whether the defendant is sane. In such a case the defence is not made out. Assuming that the prosecution have proved the elements of the offence then the defendant should be convicted, notwithstanding that the jury or magistrates have reasonable doubt as to the defendant's sanity.¹¹⁷ The Law Commission cites approvingly the judgment of the Canadian Supreme Court in *Whyte*:

The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.¹¹⁸

The question of whether the current approach to the burden of proof in English insanity cases amounts to a breach of the presumption of innocence has been raised before the European Court of Human Rights. In *H v United Kingdom*¹¹⁹ the Commission held that the insanity defence raised the presumption of sanity, not the presumption of innocence. Accordingly the Commission held that it did not breach the right to a fair trial under Article 6. Interestingly the Law Commission unequivocally concludes 'the reasoning in this judgment to be unsound'¹²⁰ and that 'the better view is that the placing of the burden on the defendant is in breach of article 6(2)'.¹²¹

The proposed new defence approaches the burden of proof differently. When arguing that the defendant is not criminally responsible by reason of a recognised medical condition, the defence must satisfy the enhanced evidential burden outlined above. Once this has been done it is then for the prosecution to disprove the defence beyond reasonable doubt. In this way the proposed new defence better upholds the presumption of innocence than does the current insanity defence.

The 'qualifying recognised medical condition' requirement

One interesting aspect of the proposed new defence is the focus on 'a qualifying recognised medical condition'. To avail herself of the proposed new defence a defendant must not simply show that she wholly lacked capacity:

- (i) rationally to form a judgment about the relevant conduct or circumstances;
- (ii) to understand the wrongfulness of what he or she is charged with having done;
- or
- (iii) to control his or her physical acts in relation to the relevant conduct or circumstances

as a result of a qualifying recognised medical condition.¹²²

There is therefore a need for the defence to satisfy the evidential burden by demonstrating a link between the medical condition and the lack of capacity. The mere existence of a 'recognised medical condition' will not suffice. The lack of capacity must 'result' from the medical condition.

The adjective 'qualifying' in the phrase 'qualifying recognised medical condition' is significant. Two types of recognised medical conditions are identified which it is proposed should not be 'qualifying' conditions. One exception is acute intoxication.¹²³ The Law Commission note that acute intoxication

¹¹⁷ This is discussed in n1 paras 1.63 - 1.64 and 8.4 - 8.45.

¹¹⁸ *Whyte* (1988) 2 SCR 3, (1988) 51 DLR (4th) 481, 493 per Chief Justice Dickson quoted in the Law Commission Discussion Paper at para 8.12

¹¹⁹ *H v UK* App No 15023/89 (Commission decision) (unreported).

¹²⁰ N1 Para 8.20

¹²¹ *Ibid* Para 8.21

¹²² *Ibid* Proposal 3, paras 4.160 and 10.8

¹²³ *Ibid* see para 3.15 and paras 4.87 - 4.92

is a recognised medical condition, but argue that the relevant prior fault case law on instances of self-induced intoxication should continue to apply in such cases.¹²⁴ Acute intoxication is differentiated from alcohol dependency syndrome which it is suggested could be a qualifying condition.¹²⁵ The second exception covers anti-social personality disorders. The Law Commission proposes that these should be excluded on policy grounds.¹²⁶ In chapter 4 there is a lengthy discussion of the nature of personality disorders and in particular of anti-social personality disorders.¹²⁷ The Law Commission notes how the classification of some disorders has changed over time. The Law Commission also notes that whilst many personality disorders are recognised medical conditions, the definitions of some personality disorders focus on the anti-social behaviour rather than on any clear underlying cause. The Commission concludes that the defence should not apply to 'any condition which is manifested solely or principally by abnormally aggressive or seriously irresponsible behaviour.'¹²⁸

Notwithstanding these limitations, the phrase 'qualifying recognised medical condition' appears much wider than the reference to 'disease of the mind' which is at the heart of the current insanity defence. The term 'disease of the mind' belongs to an earlier age. In the twenty first century it would be preferable to speak of medical conditions rather than diseases of the mind. Over the years the common law has stretched the meaning of 'disease of the mind' to include for example hyperglycaemia¹²⁹ and sleepwalking.¹³⁰ The term 'medical condition' applies much better to conditions such as sleep disorders¹³¹ and diabetes.¹³² It is also a better term to apply to conditions such as arteriosclerosis¹³³ and epilepsy¹³⁴ which have been labelled as insanity. The Law Commission have been sensitive to leave the interpretation of the terms in the new defence open to advances in the understanding of medical conditions. Neuroscience itself may contribute to this understanding indeed the accuracy of using brains particularly FNC scans to classify cases of schizophrenia has been accepted.¹³⁵

Removing the internal/external divide

One impact of the change from disease of the mind to recognised medical condition is that it dispenses with the problematic internal /external divide. This is to be welcomed. The current law has meant that hypoglycaemia caused by failing to eat after a dose of insulin has been deemed an external cause. Where the cause is deemed external the finding should be sane automatism. This would lead to the accused being acquitted and walking free from court. Whereas, a hyperglycaemic episode deemed to have an internal cause, would lead to a finding of insanity. For example in *Hennessy* the accused failed to take a prescribed dose of insulin. Hennessy's loss of control was deemed to be caused internally. This distinction is difficult to defend logically or indeed

¹²⁴ Ibid see para 4.91

¹²⁵ Ibid at para 4.88

¹²⁶ Ibid at para 4.93

¹²⁷ Ibid see particularly paras 4.93 – 4.116

¹²⁸ Ibid Proposal 4, para 4.161

¹²⁹ *R v Hennessy* [1989] 1 WLR 287 see N72

¹³⁰ *R v Burgess* [1991] 2 QB 92;

¹³¹ Discussed in n1 in paras 1.101, 1.112, 1.134

¹³² Ibid at para 1.112

¹³³ *R v Kemp* [1957] 1 QB 399

¹³⁴ *R v Bratty* [1963] AC 386; *R v Sullivan* [1984] AC 156; for discussion of *Bratty* see n65 and surrounding discussion.

¹³⁵ Mohammad R Arbabshirani et al, Classification of schizophrenia patients based on resting-state functional network connectivity, *Front Neurosci*, 2013, 7, 133.

scientifically.¹³⁶ The defendant who neglects to take insulin and the defendant who fails to take food having taken insulin can both be argued to be at fault. Both defendants' loss of control stems from their blood sugar level. Yet one defendant has the potential to claim sane automatism on the basis that the cause is viewed as external, whereas the other can only claim insanity as the cause is deemed internal or plead guilty to the offence and avoid the stigma of being found to be insane by the criminal courts. The new proposed defence would potentially apply to both defendants. If as a result of their recognised medical condition – in this case diabetes – the defendants wholly lacked capacity to control their physical acts as a result of the qualifying medical conditions then they would be entitled to the new special verdict of not criminally responsible.

The new automatism defence

This approach would mean that some defendants who are currently able to claim sane automatism would now fall within the not criminally responsible by reason of a recognised medical condition defence. To prevent overlap the Law Commission proposes changes to the existing defence of sane automatism. The suggested reformed automatism defence would be 'restricted, broadly speaking, to cases of reflex and one-off causes of total loss of control.'¹³⁷ The current law on automatism is set out in chapter 5 of the Discussion Paper. The chapter concludes with two proposals (1) that the current common law defence be abolished¹³⁸ and (2) that it be replaced by a recommendation that where '

the accused raises evidence that at the time of the alleged offence he or she wholly lacked the capacity to control his or her conduct, and the loss of capacity was not the result of a recognised medical condition (whether qualifying or non-qualifying), he or she shall be acquitted unless the prosecution disprove this plea to the criminal standard.¹³⁹

The Law Commission identifies a limited number of hypothetical instances where their proposed new automatism defence would apply. These include a case where an individual is startled and has a reflex reaction,¹⁴⁰ a case where someone is hypnotised and commits offences whilst under hypnosis¹⁴¹ and a case of a driver being hit by a stone and temporarily losing control of his car.¹⁴² In all these cases the Law Commission proposes that the defendant who wholly lacks capacity to control his or her conduct should be entitled to an acquittal, provided that the lack of capacity was not a result of the defendant's prior fault.¹⁴³

Prior fault

This exclusion of prior fault cases also applies to the proposed not criminally responsible by reason of a recognised medical condition defence. A defendant who is at fault because she culpably caused herself to lose her capacity will not generally be able to rely on the proposed new defence.¹⁴⁴ However, applying the approach adopted in intoxication cases, it is proposed that if she is charged

¹³⁶ The Law Commission quotes with approval at n1 para 1.41 Peter Fenwick's comment that 'the line drawn between sane and insane automatism can never make medical sense' P Fenwick, 'Automatism, Medicine and the Law' (1990) 17 *Psychological Medicine, Monograph Supplement* 23

¹³⁷ N1 at para 2.61

¹³⁸ N1 Proposal 12, para 5.123

¹³⁹ N1 Proposal 13, para 5.124

¹⁴⁰ The example given is of an archer who is startled, and as result turns and looses an arrow which then unfortunately hits someone. N1 para 5.106 (1) Whether this description of a 'reflex' act is the same as that given by Haggard n74 is debatable.

¹⁴¹ Ibid at para 5.106 (2)

¹⁴² Ibid at para 5.104 (1)

¹⁴³ Ibid at para 5.111

¹⁴⁴ Ibid at para 4.124

with a specific intent crime she should be acquitted.¹⁴⁵ Assessment as to whether a defendant was at fault for losing her capacity will take into account her medical condition if relevant. So, for example, a patient with Alzheimer's disease who forgets to take her prescription with the result that she loses capacity to control her behaviour may be deemed not blameworthy as her medical condition affects her memory and cognitive abilities.¹⁴⁶ Where an individual took a drug as prescribed and had no reason to believe that she would have an adverse reaction to the medicine which then caused her to wholly lose capacity she will be able to rely on the new defence.¹⁴⁷

Conclusion

The proposed new defence of not criminally responsible by reason of a recognised medical condition should provide more scope for medical and scientific evidence including neuroscientific evidence than the current insanity defence. Both the current and the proposed defences require evidence from two expert witnesses. However, the limitation of the current defence in requiring not only evidence that the defendant suffered a defect of reason arising from a disease of the mind, but also evidence that as a result the defendant either did not know the nature or quality of his action or did not know it was legally wrong, means that as previously noted the number of cases in which it is successfully claimed each year is small. Notwithstanding the way 'disease of the mind' has been stretched to include conditions such as diabetes and sleepwalking, claims brought under the current law will fail if the defendant either did not know the nature and quality of his action or did not know it was legally wrong. The proposed new defence sensibly moves away from these three elements. 'Recognised medical condition' is both wider and more appropriate than 'disease of the mind'. The proposed new term should prove more comprehensible to jurors and more in line with scientific and medical understanding for expert witnesses. In many cases neuroscientific evidence will be useful in determining whether a particular defendant does or does not suffer from a recognised medical condition.¹⁴⁸ It may also be relevant in determining whether the defendant wholly lacked capacity not in the sense of answering the question, but in the sense of providing evidence from which it might be inferred.

The reason expert evidence is likely to be required is that, as previously, the defendant's mental state at the time of the crime will have to be inferred. Robinson writes:

Once it is appreciated that all evidence of mental states is inferential and that neither neurology nor psychiatry has any magic lantern to light up the concealed corners of the defendant's mind, the question for the courts becomes the more tractable one of determining the grounds of valid inference.¹⁴⁹

¹⁴⁵ Ibid at para 4.124. Such a defendant could be convicted of a basic intent crime.

¹⁴⁶ Ibid at para 6.80 (2)

¹⁴⁷ Ibid Proposal 14, para 10.19

¹⁴⁸ In *R v Mohammed Sharif* [2010] EWCA Crim 1709 brain scan evidence was used to show that Sharif had a neuro-degenerative condition. This strengthened the appellant's case that he had genuinely been unfit to stand trial rather than 'malingering' when his case was originally heard and led to his successful appeal against conviction. Similarly in a case, such as that reported by Burns and Swerdlow (see n107), neuroscientific evidence will be valuable in showing not only that the defendant has a brain tumour, but also the likely impact of such a tumour on a person's ability to control his or her actions. In cases such as these neuroscientific evidence is unlikely to be used on its own, but as the authors found in relation to other defences (see n58) is likely to be used in conjunction with other evidence.

¹⁴⁹ Daniel N Robinson, *Wild Beasts and Idle Humours: The Insanity Defense from Antiquity to the Present* (Cambridge, Harvard University Press, 1996) 237

Therefore the words used to filter the valid inferences is an important one, the expression wholly lacking capacity will become central to both defences. In this sense capacity is a word that will have a legal meaning not a scientific one.

The word has great utility as a filter to exclude unmeritorious claims. This defence would, after all, if successfully pleaded, declare someone not criminally responsible: a much clearer exculpation than the present Not Guilty by Reason of Insanity verdict. It will only be applicable to the small number of defendants who fit within the narrow excuse provided by the defence. Capacity at the time of the crime will remain measurable only in retrospect and will be the province of the jury. The Law Commission is clearly of the view that this judgement is one for society and forms part of the framework of adjudication between the individual and the state.¹⁵⁰ This evidences the point made earlier regarding the political sensitivity of determinations that an individual is not criminally responsible.

The Law Commission's proposals, if enacted, would be a significant improvement to the current law. The clarification of the boundary between the revised automatism defence and the new verdict of not criminally responsible by reason of a recognised medical condition is appropriately pragmatic. The new defences will allow the law to label more fairly and treat more justly those who are unable to make their behaviour conform to the requirements of the law. The abandonment of the stigmatising label of insanity has to be applauded. The whole approach brings a welcome clarity to this area of the law.

However, the new defence by the nature of its construction will be of limited applicability. This means that those who are found to have substantially impaired capacity to control their behaviour may remain within the prison system. The mental capacities of such prisoners may mean that they are vulnerable and this may be detrimental to them and possibly to society at large. An issue which the Law Commission originally focussed upon when setting out their ambitions in reforming the current insanity defence.¹⁵¹

¹⁵⁰ N1 at 4.119

¹⁵¹ See n5 and accompanying text

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